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No. 785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

EASTERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CAPITAL AIRLINES, INC., TO BE NAMED AS A PARTY RESPONDENT, FOR LEAVE TO FILE BRIEF IN OPPOSITION, AND BRIEF

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INDEX

Page

MOTION OF CAPITAL AIRLINES, INC., TO BE NAMED AS A PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION 1

BRIEF FOR CAPITAL AIRLINES, INC., IN OPPOSITION 5

OPINIONS BELOW 5

JURISDICTION 6

QUESTIONS PRESENTED 6

STATUTES INVOLVED 6

STATEMENT 7

ARGUMENT 11

I. There Is No Important Question of Federal Law 11

II. The Decision Below Is Clearly Correct 18

III. There Is No Conflict of Decisions 28

CONCLUSION 31

APPENDIX A—Statutes and Regulations 33

PROOF OF SERVICE 36

CITATIONS

CASES:

American Airlines, Inc. v. *Civil Aeronautics Board*, 192 F.2d 417 ..... 12, 20

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U.S. 327 ..... 6, 9, 13

Civil Aeronautics Board v. *State Airlines, Inc.*, 338 U.S. 572 12

Colonial Airlines, Inc.-Washington-Ottawa-Montreal Service, 6 CAB 481 12

Continental Airlines, Inc.-Amendment to Certificate of Public Convenience and Necessity, 1 CAA 598 .. 12

Page

Delta Air Lines, Inc. v. *Civil Aeronautics Board*, 228 F.2d 17 ..... 13, 28, 29
Delta Air Lines, Inc., et al. v. *Civil Aeronautics Board*, Docket No. 14,798, *et al.*, D.C. Cir. Dec. 10, 1959 .. 14, 28
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 247 F.2d 562 14
Eastern Air Lines, Inc. v. *Civil Aeronautics Board*, 243 F.2d 607 14
Federal Communications Commission v. *RCA*, 346 U.S. 89 19
Federal Communications Commission v. *WOKO*, 329 U.S. 229 30
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683 15
Federal Communications Commission v. *Waltham Watch Co.*, 27 U.S.L. Week 2365 26
General Passenger Fare Investigation, CAB Docket No. 8008 17
Gilligan Will & Co. v. *Securities and Exchange Commission*, 257 F.2d 461 21
Gravel Manufacturing Co. v. *Linde*, 336 U.S. 271 17
Lake Central Airlines, Inc. v. *Civil Aeronautics Board*, 239 F.2d 46 ..... 12, 20
Lumber Mutual Casualty Ins. Co. v. *Locke*, 60 F.2d 35 15
National Airlines, Inc. v. *Civil Aeronautics Board*, 249 F.2d 13 14
National Airways, Inc.-Daytona Beach-Jacksonville Operation, 1 CAA 612 12
National Labor Relations Board v. *Columbia Enamel & Stamping Co. Inc.*, 306 U.S. 292 12
National Labor Relations Board v. *Donnelly Garment Co.*, 330 U.S. 219 15
North American Airlines, Inc. v. *Civil Aeronautics Board*, 241 F.2d 445 14
New York-Florida Case, CAB Order No. E-10884 .. 11, 15, 23
Northwest Airlines, Inc.-Certificate of Public Convenience and Necessity, 1 CAB 573 12
Northwest Airlines. Inc. v. *Civil Aeronautics Board*, 194 F.2d 339 13
Pan American World Airways Co. v. *Civil Aeronautics Board*, 121 F.2d 810 12
Pennsylvania-Central Airlines Corp.-Norfolk-Knoxville Route, 2 CAB 207 12

Page

Sangamon Valley Television Corp. v. *United States*, 269 F.2d 221 ..... 16, 29, 30, 31
Seaboard & Western v. *Civil Aeronautics Board*, 181 F.2d 777 13
Southwest-Northeast Service Case, CAB Order No. E-9758 12
United Air Lines, Inc. v. *Civil Aeronautics Board*, 155 F.2d 169 12
United Air Lines, Inc. v. *Civil Aeronautics Board*, 228 F.2d 13 13
United States v. *Forness*, 125 F.2d 928, *cert. denied*, 316 U.S. 694 21
United States v. *Morgan*, 313 U.S. 409 15
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 12
Van Curler Broadcasting Corp. v. *United States*, 236 F.2d 727, *cert. denied*, 352 U.S. 935 ..... 11, 16, 17, 31
WKAT v. *Federal Communications Commission*, 258 F.2d 418 ..... 11, 16, 17, 27, 29

STATUTES:

Administrative Procedure Act, 60 Stat. 237 ff, 5 U.S.C. §§ 1001-1010 (1952)

Section 8(b) (60 Stat. 242, 5 U.S.C. § 1007(b)) 6, 11, 13, 14, 15
Section 10(e) (60 Stat. 243, 5 U.S.C. § 1009(e)) .. 11, 13

Civil Aeronautics Act of 1938, 52 Stat. 977 ff, 49 U.S.C. §§ 401-722 (1952)

Section 2 (52 Stat. 980, 49 U.S.C. § 402) 12
Section 401 (52 Stat. 987, 49 U.S.C. § 481) .. 12, 13, 19
Section 407 (52 Stat. 1000, 49 U.S.C. § 487(e) 6, 27
Section 408 (52 Stat. 1001, 49 U.S.C. § 488) ... 6, 16, 25, 26, 27
Section 1005(f) (52 Stat. 1023, 49 U.S.C. § 645(f)) 6, 15

Federal Aviation Act of 1958, 72 Stat. 737 ff, 49 U.S.C. §§ 1301-1542 (1952) 6, 26

REGULATIONS:

Civil Aeronautics Board, Economic Regulations, 14 C.F.R. Part 241, (24 F.R. 3869, June 13, 1959) .. 26

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MOTION OF CAPITAL AIRLINES, INC., TO BE NAMED AS A PARTY RESPONDENT, FOR LEAVE TO FILE BRIEF IN OPPOSITION

Capital Airlines, Inc., hereby respectfully moves that it be named as a party respondent to this case and for leave to file the attached brief in opposition to the petition for a writ of certiorari.

The interest and standing of Capital Airlines arises from the fact that it was a party to the proceeding below, before the Civil Aeronautics Board, wherein it was granted authority to engage in scheduled air transportation over certain routes in competition with Petitioner, Eastern Air Lines, and was granted and holds authority to engage in scheduled air transportation over certain other routes for

which the Petitioner unsuccessfully sought authority.[1] Capital Airlines was also an intervenor and participated fully, both on brief and in oral argument, before the United States Circuit Court of Appeals for the Second Circuit in the case below, wherein the Petitioner unsuccessfully sought to have set aside those portions of the Civil Aeronautics Board Order adverse to Petitioner and favorable to Capital Airlines.[2] The Petitioner is now seeking, by writ of certiorari, review of the adverse judgment of the Court of Appeals below.

Thus, the Petitioner is requesting this Court to review and upon review to reverse, the judgment of the Court of Appeals upholding the validity of the Civil Aeronautics Board Order which granted Capital Airlines valuable operating rights and denied Petitioner operating rights, the grant of which would be adverse to Capital Airlines' interest. The issues of law and questions of fact raised by the Petitioner directly involve Capital Airlines, which has a substantial interest in the disposition of the petition for writ of certiorari.

Further, Capital Airlines, as a party to the proceeding before the Civil Aeronautics Board and as a recipient of substantial and valuable operating rights, would have standing to petition for a writ of certiorari under 28 U.S.C. § 1254(1) and 49 U.S.C. § 646(f) in the event the Court of Appeals below had held adverse to its interest. Therefore, Capital Airlines should have equal standing to defend its interest as a party respondent in the instant case where the decision in the Court of Appeals below, favorable to the interest of Capital Airlines, is being attacked by an adverse Petitioner.

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[1] The opinion and order of the Civil Aeronautics Board appears at pp. 1313a-1400a of the printed joint appendix used in the Court of Appeals below.

[2] The opinion of the Court of Appeals is printed in appendix B of the Petition and is reported at 271 F.2d 752.

WHEREFORE, Capital Airlines respectfully requests that it be named as a party respondent to this case and that it be permitted to file the attached brief in opposition to the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF FOR CAPITAL AIRLINES, INC., IN OPPOSITION

OPINIONS BELOW

The opinions of the Civil Aeronautics Board are not officially reported. The original opinion of the Civil Aeronautics Board, its opinion granting and denying stay, and its second supplemental opinion on reconsideration, appear in the printed joint appendix used in the Court of Appeals below (J. A. 1313a-1400a, 1469a-1497a, 1509a 1536a).[1] The opinion of the Civil Aeronautics Board lifting stay (CAB Order No. E-13526, February 19, 1959) and its first supplemental opinion on reconsideration (CAB Order No. E-13728, April 10, 1959) have not been printed. The opinion of the Circuit Court of Appeals for the Second Circuit, printed in Appendix B of the Petition, is reported at 271 F.2d 752.

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[1] Citations to the joint appendix will be indicated by "J. A."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Civil Aeronautics Board make adequate findings based upon substantial evidence to support those portions of its Order adverse to Petitioner, particularly as to the economic feasibility of new competitive service over Petitioner's routes?

2. Did the Civil Aeronautics Board violate this Court's *Ashbacker* doctrine (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945) by awarding Northwest Airlines a Chicago-Florida route?

3. Did the public announcement by the Civil Aeronautics Board of its tentative vote on the major issues of this case constitute its decision within the meaning of section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. § 1007(b)) and section 1005(f) of the Civil Aeronautics Act (52 Stat. 1023, 49 U.S.C. § 645(f))?

4. Were communications to the Civil Aeronautics Board concerning the equipment acquisition program of Capital Airlines, improper *ex parte* representations? Did the Board properly consider this matter?

STATUTES INVOLVED

The statutes involved, in addition to those set forth in the Petition, are sections 407 and 408 of the Civil Aeronautics Act of 1938 (52 Stat. 1000, 1001, 49 U.S.C. §§ 487, 488). These sections are printed in Appendix A hereto.[2]

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[2] The Civil Aeronautics Act of 1938, 52 Stat. 977 ff, 49 U.S.C. §§ 401-722, was replaced in all pertinent parts without material change by the Federal Aviation Act of 1958, 72 Stat. 737 ff. 49 U.S.C. §§ 1301-1542. Reference herein to "the Act" shall be to 1938 Act unless otherwise indicated.

STATEMENT

The Petitioner seeks review of the judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed Orders of the Civil Aeronautics Board in a "new route" proceeding known as the *Great Lakes-Southeast Service Case*. The Orders of the Civil Aeronautics Board granted and denied various applications for certificates of public convenience and necessity to perform new scheduled air transportation services.

The decision of the Civil Aeronautics Board as it affected the interest of Capital Airlines vis-a-vis Petitioner is as follows. Capital Airlines was granted an extension of its route No. 51: (a) from Pittsburgh to Buffalo via Youngstown, Akron-Canton, Cleveland and Erie; and (b) from Atlanta to Miami via Jacksonville, Tampa/St. Petersburg/Clearwater and West Palm Beach. Since Capital Airlines was already authorized to provide service from Buffalo, Cleveland, Pittsburgh and numerous other northern cities to Atlanta, the prime effect of the Civil Aeronautics Board's award was to extend Capital Airlines beyond Atlanta to Florida on a Buffalo-Cleveland-Pittsburgh-Florida route. Prior to this award, the Petitioner held monopoly rights between Cleveland, Pittsburgh and Florida, and no air carrier was certificated between Buffalo and Florida. The Petitioner's application for similar certificate authority between Buffalo and Florida was denied. Other pertinent awards include the certification of Northwest Airlines between Chicago and Florida and of Delta Air Lines between Detroit and Florida. Prior to these awards, the route between Chicago and Florida was served by both Delta Air Lines and Petitioner, and the Petitioner held monopoly rights between Detroit and Florida.

The award to Capital Airlines and the denial of the related proposals of Petitioner were supported with minor exceptions by the Civil Aeronautics Board's Bureau of Air Operations, an unbiased and independent party represent-

ing the public interest, and were recommended by the Hearing Examiner who heard the evidence.

In authorizing Capital Airlines to provide competitive service with Petitioner in the Cleveland-Florida and the Pittsburgh-Florida markets, and in selecting Capital Airlines over the Petitioner and other applicants as the carrier to provide new certificated service between Buffalo and Florida, the Civil Aeronautics Board found, *inter alia:* that the Cleveland-Florida and the Pittsburgh-Florida markets were among the top ranked noncompetitive markets in the country (J.A. 905a, 1337a);[3] that Petitioner's monopoly service in these markets was insufficient to meet the needs of the traveling public (J.A. 901a-902a, 1337a); that there was a need for new and improved air transportation between a number of cities in the Buffalo-Cleveland-Pittsburgh triangle and Florida (J.A. 901a-907a, 1337a); that the markets in question could support new and additional competitive service (J.A. 905a-907a, 1337a, 1490a-1493a); that there was a need for competition with Petitioner in this area and a need for a better competitive balance between Petitioner and Capital Airlines (J.A. 901a-907a, 922a-924a, 1337a, 1342a); that Capital Airlines had the greatest historic interest in the traffic and the greatest identity in the markets to be served (J.A. 922a-924a, 1338a, 1486a-1488a); that the selection of Capital Airlines would convenience a substantial volume of passengers with required new and improved air service (J.A. 924a-925a, 1338a-1340a); that the selection of another carrier would have a serious adverse effect upon Capital Airlines (J.A. 15230a, 1487a-1488a); that the award would benefit Capital Airlines and provide it with needed route strengthening (J.A. 1342a, 1487a); that there would be no serious injury to Petitioner or other carriers as a result of the award to Capital Airlines (J.A. 925a-932a, 1488a,

[3] Reference to pp. 592a through 974a of the joint appendix is to findings of the Hearing Examiner which were adopted by the Civil Aeronautics Board. See J.A. 1320a.

1490a-1493a); and that Capital Airlines was fit, willing and able to provide the new services authorized (J.A. 1340a-1343a, 1488a-1490a).

Petitioner, Eastern Air Lines, filed a petition for Judicial Review of the Civil Aeronautics Board's Order contending, *inter alia:* (1) that the Civil Aeronautics Board failed to make adequate findings based on substantial evidence to support those portions of its Order adverse to Petitioner, particularly with reference to the sufficiency of traffic to support new competitive service over Petitioner's routes; (2) that the Civil Aeronautics Board violated the *Ashbacker* doctrine[4] by failing to make findings on the issue of mutual exclusivity or to consolidate for hearing and decision Petitioner's application for new route authority beyond the area of investigation, the grant of which was allegedly precluded as a matter of economic fact by the certification of Northwest Airlines between Chicago and Florida; (3) that the issuance by the Civil Aeronautics Board of a press release announcing its tentative vote on the major issues six months prior to the release of its formal opinion and final decision was unlawful; and (4) that the Civil Aeronautics Board failed to consider as an element of Capital Airlines' "fitness" whether Capital made improper *ex parte* representation to the Board concerning its equipment program. These are substantially the same questions presented by the Petition for Writ of Certiorari.

As to the first contention, the Court below held "that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desirable when there was sufficient traffic (fn.

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[4] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

omitted). Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on the size of the market and diversion and have found these findings adequately stated and supported by substantial evidence. * * *." (Petition, App. B, pp. B9-B10.) Indeed, the Civil Aeronautics Board findings on these issues are set forth in detail in the 383-page Initial Decision and its 145 pages of Opinions and Orders printed in the joint appendix (J.A. 592a-974a, 1313a-1400a, 1469a-1497a, 1509a-1536a). These findings in turn are supported by a record of some 16,000 pages.

On the second contention, the Court below held that "Eastern (Petitioner) was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none (fn. omitted). This failure to make any showing of mutual exclusivity is fatal to Eastern's (Petitioner's) *Ashbacker* contentions." (Petition, App. B, pp. B5-B6.) This holding was consistent with the Civil Aeronautics Board's findings and conclusions on the same issue. (J.A. 1482a-1486a.)

With regard to the third contention, the Court below held that "the press release expressly stated that the announcement of the awards did not constitute decisions in the case but that decisions would be entered later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion. * * * Eastern's (Petitioner's) claim of prejudgment is unsound. * * * [I]f the careful marshalling of the facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision." (Petition, App. B, pp. B6-B7.) This holding is consistent with the Civil Aeronautics Board's decisions on the same issue and its practice in connection with the announcement of its tentative vote by the press

release. (J.A. 1275a-1281a, 1495a, 1516a; *New York-Florida Case,* CAB Order No. E-10884, pp. 16-17, December 21, 1956.)

On the fourth contention, concerning alleged improper *ex parte* representation with respect to Capital Airlines' equipment program, the Court below held that "the communication to the Board * * * was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case* (fn. omitted). See *Van Curler Broadcasting Corp.* v. *United States,* 236 F.2d 727, 730 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC,* 258 F.2d 418 (D.C. Cir. 1958), is inapposite." (Petition, App. B, p. B9.) This holding is consistent with the Civil Aeronautics Board's ruling on the same issue. (J.A. 1488a-1490a.)

ARGUMENT

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The issues in the present case are primarily factual, and no amount of strained semantics can convert them into basic issues of law and policy warranting review by this Court on certiorari. To the extent that issues of statutory construction and legal principles are raised by Petitioner, these issues have long since been resolved by the courts and were consistently and correctly applied to the facts in this case.

To focus attention on precisely what is offered as issues for Supreme Court determination, the Petitioner first raises the question of the adequacy of the findings and the sufficiency of the evidence on the elements of public convenience and necessity to support the certification of new air service. (Petition, p. 2.) That sections 8(b) and 10(e) (60 Stat. 242, 243; 5 U.S.C. §§ 1007(b), 1009(e)) of the Administrative Procedure Act require decisions of ad-

ministrative bodies to be supported by adequate findings based upon substantial evidence is fundamental, and this principle can not possibly be considered to be at issue in the present case. This Court has on numerous occasions interpreted these statutory provisions and has set forth clear and definite guides for their application by the administrative bodies and the reviewing courts. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *National Labor Relations Board* v. *Columbia Enamel & Stamping Co., Inc.*, 306 U.S. 292 (1939).

Likewise, the basic considerations used in evaluating the public convenience and necessity for the issuance of a certificate to engage in scheduled air transportation pursuant to section 401 (52 Stat. 987, 49 U.S.C. § 481) of the Civil Aeronautics Act are clear. They are set forth in section 2 (52 Stat. 980, 49 U.S.C. § 402) of the Act and have been further delineated by the Civil Aeronautics Board in innumerable cases with the approval of the courts.[5] Peti-

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[5] *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572 (1950); *Lake Central Airlines, Inc.* v. *Civil Aeronautics Board*, 239 F.2d 46 (D.C. Cir. 1956); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 192 F.2d 417 (D.C. Cir. 1951); *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 155 F.2d 169 (D.C. Cir. 1946); *Pan American World Airways Co.* v. *Civil Aeronautics Board*, 121 F.2d 810 (D.C. Cir. 1941); See Northwest Airlines, Inc.-Certificate of Public Convenience and Necessity, 1 CAB 573, 576-579 (1940), *general elements of public convenience and necessity;* Continental Air Lines, Inc.-Amendment to Certificate of Public Convenience and Necessity, 1 CAA 598 (1940), *improved passenger and mail service as elements of public convenience and necessity;* Colonial Airlines, Inc.-Washington-Ottawa-Montreal Service, 6 CAB 481 (1945), *adequacy of service as an element of public convenience and necessity;* Pennsylvania-Central Airlines Corp.-Norfolk-Knoxville Route, 2 CAB 207, *available transportation facilities as an element of public convenience and necessity;* National Airways, Inc.-Daytona Beach-Jacksonville Operation, 1 CAA 612, *economic characteristics as elements of public convenience and necessity;* Southwest-Northeast Service Case, CAB Order No. E-9758, Nov. 1955, *competition as element of public convenience and necessity.* These cited cases are by no means exhaustive on the

tioner's contention that there are no definitive guides as to the findings which must be made under section 8(b) and 10(e) of the Administrative Procedure Act on the element of "public convenience and necessity" to support an award pursuant to section 401 of the Act is not well founded. What the Petitioner is actually requesting this Court to do is to again review the record and the Board's findings and render an opinion on the adequacy of the findings and the sufficiency of evidence—something the Court below has already done in accordance with clear principles and criteria enunciated by this Court and established by statute.

Next, the Petitioner raises the question of the application of the *Ashbacker* doctrine to the individual facts of this case. There is no issue as to the validity of the *Ashbacker* doctrine or its application to new route proceedings before the Civil Aeronautics Board. The soundness of the fundamental principle that "where two *bona fide* applications are mutually exclusive the grant to one without a hearing to both deprives the loser of the opportunity which Congress chose to give him," announced by this Court in *Ashbacker* v. *Federal Communications Commission*, 326 U.S. at 327, is conceded by all parties. The *Ashbacker* principle was first applied to proceedings before the Civil Aeronautics Board in *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F.2d 777 (D.C. Cir. 1949). By a series of cases, the courts have applied the *Ashbacker* principle to a variety of factual situations and have evolved guides for its application to the unique problems of air route cases which fully protect the parties, right to a fair hearing on mutually exclusive applications.[6]

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subject and no one element is determinative, as each case must be decided in light of the particular circumstances surrounding the proposed new operation. However, the basic elements of public convenience and necessity are clear.

[6] *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 194 F.2d 339 (D.C. Cir. 1952); *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F.2d 13 (D.C. Cir. 1955); *Delta Air Lines, Inc.* v. *Civil*

There is no conflict in principle between this long line of cases and the present case concerning the *Ashbacker* doctrine, nor has there been a departure from these well-defined guides in the application of the *Ashbacker* doctrine to the facts in this case. In fact, the Petitioner has raised no significant issue of construction or application of the *Ashbacker* doctrine. Review is sought of a decision which turns solely upon analysis of the particular facts involved. Petitioner was afforded ample opportunity to present evidence in accordance with established *Ashbacker* principles to support its contention of mutual exclusivity. On the basis of the evidence, the Civil Aeronautics Board found that Petitioner did not sustain its burden of establishing that the grant of Northwest Airlines' application would, as a matter of economic fact, preclude a subsequent grant of Petitioner's application. The Civil Aeronautics Board further found that the facts of record clearly demonstrate that the award to Northwest would not preclude a later grant of Petitioner's application. (J.A. 1482a-1486a). The Court below affirmed. (Petition, App. B, pp. B5-B6.)

The third question raised by the Petitioner is the legality of the Civil Aeronautics Board's public announcement of its tentative vote upon the major issues of the case six months prior to the issuance of its decision and formal opinion. The Petitioner contends that section 8(b) of the Administrative Procedure Act requires that all decisions of administrative bodies must contain "findings and conclusions as well as the reasons or basis therefor upon all the material issues of fact, law or discretion presented on

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Aeronautics Board, 228 F.2d 17 (D.C. Cir. 1955); *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 241 F.2d 445 (D.C. Cir. 1957); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 243 F.2d 607 (D.C. Cir. 1956); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 247 F.2d 562 (D.C. Cir. 1957); *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F.2d 13 (D.C. Cir. 1957); *Delta Air Lines, Inc., et al.* v. *Civil Aeronautics Board*, Docket No. 14,798, *et al.*, D.C. Cir., Dec. 10, 1959).

the record." (Petition, p. 24.) That this is a correct recital of section 8(b) of the Administrative Procedure Act and a proper statement of the law is not controverted. However, the issue here presented is one of fact. That is, was the issuance of a press release announcing the tentative vote on certain issues a decision? The press releases specifically stated "that this announcement does not constitute the Board's decision in these cases which will be entered and issued at a later date." (J.A. 1276a, 1281a.) In the *New York-Florida Case*, CAB Order No. E-10884, pp. 16-17, Dec. 21, 1956, the Civil Aeronautics Board set forth in detail the public interest factors which prompted it to adopt the press release procedure and emphasized that a "press release is no more than a public statement of the tentative vote on a given case by a majority of the Board, and the vote is no more final in a case in which a press release is issued than it is when a press release is not issued." As indicated, the decision making process remained unchanged. "The release merely makes public what heretofore was intended to be confidential, and does not disturb the long established Board practice with respect to its deliberations on pending cases." The provisions of section 8(b) of the Administrative Procedure Act and section 1005(f) of the Civil Aeronautics Act were not violated by the mere public announcement of the tentative vote on the major issue of this case, nor did this procedure deny Petitioner a fair hearing, constitute a prejudgment of the case or otherwise prejudge its interest. The Court below so found. (Petition, App. B, pp. B6-B7.) See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219 (1947); *United States* v. *Morgan*, 313 U.S. 409 (1941); *Lumber Mutual Casualty Ins. Co.* v. *Locke*, 60 F.2d 35 (2d Cir. 1932). Clearly, this is not an issue warranting review by this Court.

Lastly, the Petitioner raises a question as to the validity of the award to Capital Airlines because of an alleged *ex parte* representation concerning its equipment program

made to the Civil Aeronautics Board during the pendency of the proceeding below. Here, again, the question involved is narrow and factual and there is no significant issue of policy or statutory interpretation presented for this Court's determination. It is well settled that private *ex parte* representations to members of administrative bodies directed to the issues of pending adversary proceedings with intent to influence their decision are improper and a basis on which an award may be vitiated. The principles under which this doctrine of fair play will apply have been clearly set forth by the courts. See *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959); *WKAT* v. *Federal Communications Commission*, 258 F.2d 418 (D.C. Cir. 1958).

However, the issue here is not whether such *ex parte* representations are a basis on which an agency's action may be vitiated but whether the communications between Capital Airlines and the Civil Aeronautics Board concerning its equipment acquisition program were improper or indeed *ex parte* under the clear principles enunciated by the courts. See *Van Curler Broadcasting Corp.* v. *United States*, 236 F.2d 727 (D.C. Cir. 1956); *cert. denied*, 352 U.S. 935 (1956). There is absolutely no controversy as to the extent and nature of the communications between Capital Airlines and the Civil Aeronautics Board. (J.A. 1489a-1490a.) The communications related to matters relevant to Civil Aeronautics Board functions under section 408 of the Act completely unconnected with the pending case. The communications made no reference to the present case and gave no indication that the information furnished to the Civil Aeronautics Board concerning Capital's equipment program was or should be considered in connection with the proceeding below. (J.A. 1498a, 1499a, 1500a.) In fact, it is clear from the Opinion below that such information was *not* relied upon in the selection of Capital Airlines to operate the Buffalo-Florida route. (J.A. 1489a-1490a.) Further, the communications between

the Board and Capital Airlines concerning its equipment acquisition program were entirely in the open, above board and consistent with the Civil Aeronautics Board's regulatory functions. The same information which was transmitted to the Civil Aeronautics Board was widely reported in the press and Capital Airlines, itself, publicly stated most of the details of the program, in sworn testimony before the Civil Aeronautics Board in the pending *General Passenger Fare Investigation*, CAB Docket No. 8008 (testimony of Mr. Carmichael, Tr. 4745-54; see also Ex. CAP 12, D, p. 6). Petitioner is a party to and was represented at that proceeding.

On the basis of these uncontested facts and on the basis of well-defined principles as to proper *ex parte* representation, the Court below held that "the communication to the Board * * * was not improper, for such information was relevant to the Board functions unconnected with the *Great Lakes-Southeast Service Case* (fn. omitted). See *Van Curler Broadcasting Corp.* v. *United States*, 236 F.2d 727, 730 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958), is inapposite." (Petition, App. B, p. B9.)

Clearly, review on these findings of fact, the correctness of which have been concurred in by the Civil Aeronautics Board and the Court below, is not warranted. As stated by this Court in *Gravel Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271 (1949) at 275, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in absence of a very obvious and exceptional showing of error." The Petitioner has made no such showing.

II

THE DECISION BELOW IS CLEARLY CORRECT

After an extensive eight week hearing and a searching examination and evaluation of the voluminous 16,000 page record by the Civil Aeronautics Board and its Hearing Examiner, the Board awarded Capital Airlines its route from Buffalo, Cleveland and Pittsburgh to Florida.

In authorizing Capital Airlines to provide competitive service with Petitioner in the Cleveland-Florida and Pittsburgh-Florida markets, and in selecting Capital over the Petitioner and other applicants as the carrier to provide new certificated service between Buffalo and Florida, the Civil Aeronautics Board found, *inter alia:* that the Cleveland-Florida and Pittsburgh-Florida markets were among the top ranked non-competitive markets in the country (J.A. 905a, 1337a);[7] that Petitioner's monopoly service in these markets was insufficient to meet the needs of the traveling public (J.A. 901a-902a, 1337a); that there was a need for new and improved air transportation between a number of cities in the Buffalo-Cleveland-Pittsburgh triangle and Florida (J.A. 901a-907a, 1337a); that the markets in question could support new and additional competitive service (J.A. 905a-907a, 1337a, 1490a-1493a); that there was a need for competition with Petitioner in this area and a need for a better competitive balance between Petitioner and Capital Airlines (J.A. 901a-907a, 922a-924a, 1337a, 1342a); that Capital Airlines had the greatest historic interest in the traffic and the greatest identity in the markets to be served (J.A. 922a-924a, 1338a, 1486a-1488a); that the selection of Capital Airlines would convenience a substantial volume of passengers with required new and improved air service (J.A. 924a-925a, 1338a-1340a); that the selection of another carrier would have a serious adverse effect upon Capital Airlines (J.A.

[7] Reference to pp. 592a through 974a of the Joint Appendix is to findings of the Hearing Examiner which were adopted by the Civil Aeronautics Board. See J.A. 1320a.

15230a, 1487a-1488a); that the award would benefit Capital Airlines and provide it with needed route strengthening (J.A. 1342a, 1487a); that there would be no serious injury to Petitioner or other carriers as a result of the award to Capital Airlines (J.A. 925a-932a, 1488a, 1490a-1493a); and that Capital Airlines was fit, willing and able to provide the new services authorized (J.A. 1340a-1343a, 1488a-1490a).

These findings include many proper elements of "public convenience and necessity" and are more than sufficient to support an award pursuant to section 401 of the Act (52 Stat. 987, 49 U.S.C. § 481). Each is supported by substantial evidence. Although Petitioner has couched its issue on the adequacy of findings and the sufficiency of the evidence in terms of broad principles and has requested this Court to define the requirements of lawful findings on the elements of "public convenience and necessity," the factual question actually raised is uniquely narrow. The Petitioner contends that the Civil Aeronautics Board failed to make findings on the actual dollar cost which would be incurred by the carriers in operating the new competitive services authorized. The Petitioner alleges that the failure to make this one determination in the precise manner suggested renders the awards invalid for lack of supporting findings notwithstanding the many findings on other elements of public convenience and necessity.

Clearly the Petitioner's basic premise is incorrect. A finding on the exact dollar cost of a proposed competitive operation is neither required nor a controlling element of "public convenience and necessity" for an award under section 401 of the Act. In *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86 (1953) at 97, this Court held:

> "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a

> demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' • • • In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast • • •."

In *American Airlines* v. *Civil Aeronautics Board*, 192 F.2d 417, 420-421 (D.C. Cir. 1951), the Court held that precise dollar estimates as to actual traffic potential and possible diversion under a new award are not required. See also *Lake Central Airlines* v. *Civil Aeronautics Board*, 239 F.2d 46, 49 (D.C. Cir. 1956). The Board's findings on this issue more than meet the standards established by this Court.

The possible traffic and revenue diversion from Petitioner as a result of the award to Capital Airlines was fully covered by the Hearing Examiner in his Initial Decision and was found not to be excessive in view of the important benefits which are provided the traveling public. The Examiner properly found that diversion will be largely offset by the new traffic generated by Capital Airlines and the fantastic traffic growth of the markets involved (J.A. 924a-932a).

The Board adopted most of the Hearing Examiner's findings, and it further found that Petitioner obtained 321 million revenue passenger miles and received 18 million dollars in revenue in 1956 from the routes over which Capital Airlines is authorized to compete. Assuming Capital Airlines' newly authorized service had been installed during 1958, the Civil Aeronautics Board estimated that Petitioner would have nevertheless obtained 10 million more revenue passenger miles than it did in 1956 and would have received 500 thousand dollars more revenue

than it did in 1956. (J.A. 1491a.) Further, the Civil Aeronautics Board pointed out:

> "The diversion estimate is also subject to downward adjustment because the traffic estimate used in the table above does not include the growth over and above normal growth which we would expect in those markets which Eastern (Petitioner) has been serving as a monopoly carrier. Thus, as to Capital's new authorization, 69 percent of the total passenger revenue included in the table is, by Eastern's (Petitioner's) own figure, derived from monopoly markets. • • • Thus, we believe the actual dollar diversion which Eastern (Petitioner) will experience will be offset by the added growth due to the spur of competitive service in these markets in which Eastern (Petitioner) will share." (J.A. 1492a-1493a.)

The Civil Aeronautics Board has thus fully considered the matter of diversion from Petitioner. It concluded on the basis of adequate findings and evidence "that Eastern's financial position will not be seriously affected by • • • [the Board's] awards in this case." (J.A. 1490a.) Upon judicial review the Court below stated:

> "We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence." (Petition, App. B, p. B10.)

The Court below was clearly correct in its determination that the Board's public announcement of its tentative vote upon the major issues of this case was not a decision and did not constitute a prejudgment of the case or otherwise prejudice the Petitioner. The cases cited by the Petitioner in support of its contention are clearly inapplicable. *Gilligan Will & Co.* v. *Securities and Exchange Commission*, 257 F.2d 461 (2d Cir. 1959), concerns the Commission's issuance of a press release accusing a person of violating the Securities Act only three days after it commenced a violation proceeding against him and prior to any hearing. *United States* v. *Forness*, 125 F.2d 928 (2d Cir. 1942), *cert.*

denied, 316 U.S. 694 (1942), involves the mechanical adoption of defendant's proposed findings by the Court in its final decision with the result that the findings were not supported by the evidence and were not in substantial accord with the opinion. Both of these cases turned on issues and facts not present in this case. Here the Civil Aeronautics Board merely announced publicly its tentative vote on the issues two months after all procedural steps had been completed and the case had been submitted for decision. The press release expressly stated that the announcement did not constitute the decision.

Petitioner contends that notwithstanding the advisory nature of the press release its issuance tends to solidify the Civil Aeronautics Board's decision because of the reluctance of members to change their publicly announced position and thereby pre-judges the case. That there is no substance to this contention is demonstrated in this very case. As pointed out by Petitioner itself (Petition, p. 23), the actual decision of the Board contained references to current data of record which were not available to the Civil Aeronautics Board at the time of the prior press release. Far from indicating improper procedure, as urged by Petitioner, this practice indicates full and fair consideration of all facts of record up to the time of the actual decision. It shows that the Civil Aeronautics Board did not regard its press release as the decision, but instead regarded it as a report of a tentative vote which was subject to further deliberation and to change, if need be, as the facts might warrant.

Furthermore, the tentative vote announced by press release is *actually changed* on occasion by the subsequent decision of the Board. Such change occured in the present case. For example, the press release announced that Capital Airlines' new Great Lakes-Florida route "would be restricted from providing single-plane service from *any of the cities on its system west of Cleveland*—such as Detroit, Chicago, Milwaukee or the Twin Cities—to any points

south of Atlanta." (J.A. 1228a-1280a; underscoring added.) But the subsequent decision of the Civil Aeronautics Board modified the announcement of the press release by finding:

> "As discussed more fully below, we will not permit Capital to provide single-plane service to Florida from such points as Detroit, Toledo, Chicago, Milwaukee and the Twin Cities in competition with other new services we are authorizing herein. *However, Capital will be able to provide its other Michigan cities, such as Flint, Lansing and Grand Rapids with first single-carrier single-plane service to Florida via a stop at such route junction points as Cleveland or Pittsburgh.*" (J.A. 1339a, underscoring added.)

Other instances where the tentative vote announced by press release were actually changed upon decision in this case are contained in Capital Airlines' brief in reply to Petitioner's petition for rehearing filed in the Court below and which has been certified as part of the record herein.

It is clear that the Board's press release did not constitute the final decision in this case. Issuance of the press release obviously did not preclude full and fair consideration by the Civil Aeronautics Board of its actual final decision. That decision was arrived at only after several careful reconsiderations of the detailed original decision. The tentative vote which had been announced by the press release was expressly subject to change—and was actually changed—by the Board's original decision and later on several occasions by the decisions on reconsideration.

The practice of announcing its tentative vote on major issues was adopted by the Civil Aeronautics Board to forestall such information being used for personal advantage by a limited number of individuals to whom such information has been "leaked" in the past. See *New York-Florida Case*, Order No. E-10884, pp. 16-17, December 21, 1956. The practice has in no way altered the decision making process, nor has it in any way prejudiced the Petitioner. The Court below so held. (Petition, App. B, p. B7.)

The Civil Aeronautics Board's finding that Capital Airlines is "fit, willing and able" was based upon voluminous evidence of record and was not predicated upon information received as a result of the alleged *ex parte* communications. The Court's decision below that such information was relevant to functions unconnected with the pending case is clearly correct.

In ruling upon the issue of Capital Airlines' fitness, willingness and ability in its original opinion below, the Board found *inter alia:*

> "We have little doubt but that an established trunk carrier, such as Capital, permanently licensed to operate regulated air transportation service in major traffic markets, is fit, willing and able within the meaning of the Act, and that it will be able to expand its base of operations to the extent necessary to accommodate the needs of the new markets certificated herein. The history of the growth and development of the trunk carrier industry gives ample evidence of this fact." (J.A. 1343a.)
>
> "As to the question of equipment, Capital tried its case on the basis of utilizing Constellation and Viscount aircraft it presently owns, a plan which we have reviewed and which we believe is at least adequate for purposes of resolving the issues before us. We have no doubt that with the important markets being made available to the carrier by our extensions herein, Capital will be able to acquire such additional aircraft as may be needed in the future to satisfy the needs of traffic growth." (J.A. 1342a.)

In its opinion on reconsideration the Civil Aeronautics Board stated with reference to petitioner's contention that Capital Airlines made *ex parte* representations concerning its equipment program, as follows:

> "We considered Capital's fitness and its new service proposals in this case on the basis of the carrier's own presentation of record and on the basis of equipment presently owned and operated, as is clearly indicated at page 25 of our prior Opinion. No new Capital

equipment arrangement was before us in this case and our deliberations were guided only by the record evidence. (footnote omitted)

"It is true that word of a Capital equipment acquisition arrangement came to us prior to our decision in this case. * * *.

"Even though we were aware of the Capital-General Dynamics negotiations from trade press reports and from the exchange of correspondence referred to above, this factor, not of record in this case, did not affect our decision in any way. As was made abundantly clear in our Opinion, the selection of Capital to operate the new Buffalo-Miami route was based on factors in favor of its selection which outweighed to a considerable degree the claims of other carriers to the route." (J.A. 1489a-1490a.)

There is absolutely no controversy as to the extent and nature of the alleged *ex parte* communications which were fully set forth in the Civil Aeronautics Board's opinion as follows:

"We received a teletype message from General Dynamics Corporation stating that it had entered into an agreement with Capital covering the sale of 15 Convair 880 aircraft and undertaking, on notice from Capital, to arrange for leasing to Capital of up to ten 1049H Constellation aircraft pending delivery of the 880's. (J.A. 1498a) By letter of February 12, 1958, the Board asked Capital to submit a copy of the agreement to the Board since it raised a question as to the existence of the section 408 control relationship between Capital and General Dynamics. (J.A. 1499a.) By letter of February 14, 1958, Capital submitted a copy of the agreement to the Board. Since the agreement was not final and the undertakings of the parties were not definite, the Board informed Capital, by letter of March 7, 1958, that a determination whether section 408 was or was not involved could not be made. (J.A. 1500a.) It was therefore suggested that Capital and General Dynamics consult the staff when the arrangement had been finalized to consider whether the Act requires the filing of an application and

prior approval of the arrangement by the Board before its terms could become effective. Board records do not indicate that such contacts with the staff have been made or that a final agreement has been filed." (J.A. 1489a-1490a.)

Capital Airlines and every other major carrier is constantly involved in many cases before the Civil Aeronautics Board. If Petitioner's contention were accepted, there could be no disclosure of carriers' equipment programs without involvement in improper *ex parte* representations as to some pending proceeding. To say that the Civil Aeronautics Board is precluded from receiving information on the equipment program of air carriers when such carriers have pending before the Board adversary licensing proceedings is tantamount to saying that the Board is foreclosed from performing its statutory obligation to regulate these carriers. See *FTC* v. *Waltham Watch Co.*, 27 U.S.L. Week 2365 (U.S.D.C., S.D.N.Y., Jan. 13, 1959.)

The Civil Aeronautics Board's powers and duties under the Federal Aviation Act of 1958 are broad and diverse. They touch every vital part of an air carrier's practices. Pursuant to its manifold duties and responsibilities under the comprehensive regulatory statute, the Board or its staff are in daily contact with the regulated carriers and there is a constant exchange of information entirely apart from any pending licensing proceeding. The telegram sent to the Board was an entirely appropriate method of advising the Board of matters which might raise questions of possible control under section 408 of the Act.[5] Such questions are entirely separate and distinct from the route proceeding below. Subsequent to the receipt of the tele-

[5] In fact the Civil Aeronautics Board has recently adopted a regulation which requires carriers to file details of their new equipment commitments as part of their routine reports. Amendment No. 9 to Part 241 of the Economic Regulations, 24 F.R. 3869, June 13, 1959. (See App. A.)

gram, the Board, by letter dated February 12, 1958, did inquire into the question of possible control under section 408 and requested a copy of the agreement pursuant to its authority under section 407(e) of the Act.

As is apparent from the telegram and the letter inquiries by the Civil Aeronautics Board prompted thereby, *there was no reference to the proceeding below and no indication that the information supplied by Capital should be considered in connection with the proceeding below.* Pursuant to the Board's request, by letter of February 14, 1958, Capital Airlines supplied the Board with a copy of the agreement with General Dynamics. By subsequent letter to the Board dated February 19, 1958, Capital advised the Board that it need not hold the agreement in confidence. Therefore, insofar as Capital and General Dynamics were and are concerned, a copy of the original letter agreement is on file with the Board pursuant to section 407, and the Board may release the agreement to the public if it so desires. (J.A. 1301a-1304a.)

As the Court below correctly held, "the communication to the Board * * * was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case.* * * * There is no indication that Capital made any covert communication to members of the Board and hence the recent case of *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958), is inapposite." (Petition, App. B, p. B9.)

Petitioner concedes that Capital Airlines was not guilty of the improprieties shown in the *WKAT* case but it contends that all *ex parte* communications are improper and must be considered in connection with an applicant's fitness. Petitioner suggests that this Court require administrative bodies to hold hearings as to an applicant's fitness every time an allegation of *ex parte* representations is raised no matter how frivolous. (Petition, p. 36.) What the Petitioner fails to understand is that the communications between Capital Airlines and the Civil Aeronautics Board were not in violation of the Board's rules and were

not *ex parte* within the meaning of the term as used by Petitioner. Further, the complete facts concerning the nature and extent of the communications are known to all parties and uncontested; the Board directed itself to the only issue which Petitioner contends has remained unresolved and held:

> "We have considered Eastern's contentions but cannot conclude that Capital's conduct in regard to this matter renders it unfit to receive the Buffalo-Miami award." (J.A. 1490a, fn. 26a.)

III

THERE IS NO CONFLICT OF DECISION

Only with regard to two of the questions presented has the Petitioner contended that the decision of the Court below is in conflict with decisions in another circuit. In neither case is there any conflict in application of legal principles or statutory interpretation. In each case the courts have applied the same legal principles, and the decision in each turns on its own individual facts.

The first alleged conflict is between the decision below (Petition, App. B) on the application of the *Ashbacker* doctrine and the decision of the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines* v. *Civil Aeronautics Board* (Petition, App. C). Petitioner contends that in the latter case the District of Columbia Circuit ruled that where a party had made a *prima facie* showing of mutual exclusivity, the *Ashbacker* doctrine applied, and under such circumstances the Civil Aeronautics Board was required to make specific findings on mutual exclusivity pursuant to the principles of *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F.2d 17 (1955). (Petition, p. 21.) In the case below, the Court held that Petitioner's failure to make any showing of mutual exclusivity was fatal to its *Ashbacker* contentions pursuant to the principles of *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F.2d 17 (1955) (Petition, App. B, pp. B6-B7). Thus, it is apparent that

there is no conflict between the two circuits. Both applied the same principles as enunciated in the *Delta Air Lines* case, *supra*. In the District of Columbia Circuit case, there was a *prima facie* showing of mutual exclusivity; in the case below there was no evidence presented on the issue of mutual exclusivity. Both circuits are in accord on the *Ashbacker* principles. The different result obtained by each of the courts was the result of a different factual situation.

Further, the Civil Aeronautics Board did rule on Petitioners's *Ashbacker* contentions notwithstanding its failure to present evidence in support thereof, and the Board found:

> "That consideration convinces us that the grant of Chicago-Atlanta-Tampa/St. Petersburg/Clearwater-Miami authority to Northwest will not preclude a subsequent grant of Eastern's application for an extension of its routes west from Chicago to the Pacific Northwest." (J.A. 1482a-1483a.)

The second alleged conflict is between the decision below (Petition, App. B) on the issue of *ex parte* representations and the decisions of the Court of Appeals for the District of Columbia Circuit in *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959), and *WKAT* v. *Federal Communications Commission*, 258 F.2d 418 (D.C. Cir. 1958). The most summary reading of the cases will show that the factual situations are completely dissimilar, and the dissimilarities are the sole basis for the different results.

The *WKAT* case involved applications for television construction permits. An award was made, and appeals were taken to the Court of Appeals for the District of Columbia Circuit. The Federal Communications Commission itself made a motion to remand the case to the Commission, alleging that since the filing of the appeals public charges had been made in the course of a Congressional

investigation; that one of the Commissioners who had participated in the proceeding before the Commission, but who had since resigned, should have disqualified himself. The Court of Appeals held that the cases should be remanded to the Commission. The Court below considered the *WKAT* case and correctly held it to be inapposite.

Not only are the extent and nature of communications between Capital Airlines and the Civil Aeronautics Board completely different from those involved in the *WKAT* case, but in the latter case the Commission itself moved to remand the case. In the present case, the Civil Aeronautics Board has clearly stated that its decision was not influenced and that Capital's conduct did not render it unfit. This in itself completely distinguishes the two cases. See *Federal Communications Commission* v. *WOKO*, 329 U.S. 229 (1946).

The *Sangamon Valley* case was very similar to the *WKAT* case. It involved numerous covert *ex parte* representations to members of the Commission directed solely to the issues in a pending proceeding in flagrant disregard of the agency's rules. The case concerned the reallocation of television channels by the Federal Communications Commission pursuant to a rule-making proceeding. Intervenor, Signal Hill Telecasting Corporation, and principal beneficiary of the subsequent reallocation of Channel 2 from Springfield, Ill., to St. Louis, Mo., through its president, spoke to each of the Commission members individually and in the privacy of their offices while the proceeding was pending of its desire to have Channel 2. Seven weeks after the cut-off date for filing reply comments, Signal Hill Television sent each Commissioner a private letter in which it contended and tried to prove that Channel 2, if based in St. Louis, would reach 166,700 more homes in the State of Illinois than if it were based in Springfield, Illinois.

Thus, it is clear that the *Sangamon Valley* case involved covert *ex parte* representations concerned with and directed to a specific contested proceeding pending before the Commission. The *ex parte* communications were not received by the Commission pursuant to its other unconnected regulatory functions. They related solely and exclusively to the pending proceeding.

The present situation is very different. The single telegram and the correspondence prompted thereby of which Petitioner complains gave information relevant to Civil Aeronautics Board functions unconnected with the route proceeding below. None of the communications makes reference, either actual or implied, to the issues of any pending proceeding. Hence, the rationale of the *Sangamon Valley* case is clearly not applicable here. As held by the Court below, the controlling rationale is contained in *Van Curler Broadcasting Corp.* v. *United States*, 236 F.2d 727 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 935. The Court in the *Sangamon Valley* case was careful to point out that its decision was not contrary to the *Van Curler* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 13, 1960

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Civil Aeronautics Act of 1938, 52 Stat. 977ff; 49 U.S.C. §§ 401-722

ACCOUNTS, RECORDS AND REPORTS

Inspection of Accounts and Property

"Section 407(e) The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; and it may employ special agents or auditors who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this Act, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5 (8) of the Interstate Commerce Act, as amended." [52 Stat. 1000; 49 U.S.C. § 487(c).]

CONSOLIDATIONS, MERGERS, AND ACQUISITION OF CONTROL

Acts Prohibited

"Section 408(a) It shall be unlawful unless approved by order of the Board as provided in this section—

* * *

"(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

* * *

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person

engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

* * *

Power of Board

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use air-

craft to public advantage in its operation and will not restrain competition."

* * *

Jurisdiction of Accounts of Noncarriers

"(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this Act, be subject, in the same manner as if such person were an air carrier, to the provisions of this Act relating to accounts, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof."

Investigation of Violations

"(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this Act, as may be necessary, in the opinion of the Board, to prevent further violation of such provision."
[52 Stat. 1001; 49 U.S.C. § 488]

Civil Aeronautics Board Economic Regulations
(14 CFR Part 241)

SCHEDULE B-2 — NOTES TO BALANCE SHEET

(c) The amounts and estimated delivery dates of any purchase commitments of material size and not of a recurrent routine character shall be explained on this schedule. In the case of commitments involving flight equipment, the amount for each equipment type may be given in total, including any engines, airframes and the number of engines by type shall be given for each complete aircraft. Reports on commitments other than for flight equipment are required only in the December 31 report of each calendar year (24 F.R. 3020, June 13, 1959).

Proof of Service

I, James H. Bastian, one of the attorneys for Capital Airlines, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of April, 1960, I served copies of the foregoing Motion of Capital Airlines, Inc., and Brief in Opposition, on the parties as follows:

1. On the United States by mailing copies in duly addressed envelopes, with first class postage prepaid, to the Honorable J. Lee Rankin, Esq., Solicitor General for the United States, to Victor R. Hansen, Esq., Assistant Attorney General and to Richard A. Solomon, Esq., At, torney, all of the Department of Justice at Washington 25, D. C.

2. On Respondent, Civil Aeronautics Board, by mailing copies in duly addressed envolepes, with first class postage prepaid, to Franklin M. Stone, Esq., General Counsel of the Civil Aeronautics Board, to John H. Wanner, Esq., Associate General Counsel, to O. D. Ozment, Esq., Assistant General Counsel, and to Morris Chertkov, Esq., Attorney, all with the Civil Aeronautics Board at Washington 25, D. C.

3. On Petitioner, Eastern Air Lines, Inc., by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to E. Smythe Gambrell, Esq., W. Glen Harlan, Esq., Harold L. Russell, Esq., Attorneys for Eastern Air Lines, Inc., 825 Citizens and Southern National Bank Building, Atlanta, Georgia.

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